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No. 303

In the

# Supreme Court of the United States

..... Term, 1955

JAMES WADE BRASWELL,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.*

CHARLES W. TESSMER,
202 Fidelity Building,
Dallas, Texas,
*Counsel for Petitioner.*

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JAMES WADE BRASWELL,

*Petitioner,*

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UNITED STATES OF AMERICA,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.*

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on July 1st, 1955.

Petition for Rehearing was timely filed and overruled on July 16th, 1955, thereafter Motion to Stay the Mandate was denied by the Court and Application for Bail was submitted to the Honorable Tom C. Clark, Justice of this Court, on July 26th, 1955.

## CITATIONS TO OPINION BELOW

The case is reported in .... F. 2d .... (Printed in Appendix A).

## JURISDICTION

The jurisdiction of this court is invoked under Title 28, Section 1254 (sub-sec. 1), 62 Stat. 928.

## QUESTIONS PRESENTED

1. The decision of the Circuit Court of Appeals with reference to the validity of the indictment is in conflict with decisions of this court and other courts of appeal.

2. The decision of the Court of Appeals is in conflict with the decisions of this court in holding that the evidence in the case was legally obtained.

3. The decision of the Court of Appeals holding that a suspended sentence under Texas law is a final conviction within the Federal Firearms Act is in conflict with a decision of the Court of Appeals for the 9th Circuit.

## STATUTE INVOLVED

Title 15, Sec. 902(e) of the Federal Firearms Act, 52 Stat. as amended; Title 15, Sec. 904, U. S. C. A.; Rule 7(c), F. R. C. P.; Art. 62, V. A. P. C.; Art. 769, V. A. C. C. P.

## STATEMENT OF THE CASE

Appellant was convicted of a violation of the Federal Firearms Act, Title 15, Section 902(e), in that he transported a firearm in Interstate Commerce, after having been convicted of a crime of violence, to-wit: burglary. The proof showed that Petitioner had not been convicted of burglary but had received a suspended sentence which was

not a final conviction within the Federal Statute. The Texas law was proved to the trial court and controls the question as to whether the conviction was a final one as required by the Federal Statute.

The indictment in this case was fatally defective and a Motion to Dismiss Indictment was made at the proper time and overruled by the Court; Motion in Arrest was duly filed and overruled. The error was raised in the Motion for New Trial. The indictment was defective in that it did not charge in the wording of the Statute nor did it describe the forbidden item, to-wit: a firearm as required by the Statute.

The Court also erred in overruling a timely Motion to Suppress Illegal Evidence which was supported by testimony (sworn affidavit) which was not controverted by the Government, therefore the Court of Appeals erred in holding that the Trial Judge properly overruled the Motion there being no factual issue for the court to decide. This ruling became the law of the case and the fact that the Government later introduced the testimony of one police officer tending to controvert the proof adduced on the Motion to Suppress Evidence before trial could not be used to refute the motion since the erroneous ruling of the court had become the law of the case. The detention complained of in the Motion to Suppress Evidence was unreasonable and should have entitled Petitioner to have the evidence suppressed. The fact that State officers made the arrest and search did not take the case out of the doctrine of *Gambino v. Uiited States, 275 U. S. 310.* The proof on

Motion to Suppress clearly shows that the State officers were attempting to enforce a Federal Statute—the Mann Act.

## FACTS

The evidence shows that Petitioner was in possession of a firearm in Oklahoma City, Oklahoma, which had previously been purchased in Dallas, Texas. Petitioner made certain admissions to the police officers (sought to be suppressed) that he had transported the firearm from Dallas, Texas, to Oklahoma City, Oklahoma; at the trial Petitioner admitted ownership of the firearm, but disputed the fact that he had transported the firearm and testified that his girl friend, Peggy Raleigh, had transported the firearm to Oklahoma City. He further testified that he made certain admissions concerning the transportation to protect his girl friend from a charge of carrying concealed weapons. The proof further showed that Appellant had not been finally convicted of a felony as required by the Federal Statute.

## REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in sustaining the Trial Court's action in overruling the Motion to Dismiss the Indictment is in conflict with the following authorities:

*Cruikshank v. U. S., 92 U. S. 542;*

*U. S. v. Hess, 124 U. S. 483;*

*Isenminger v. U. S., 16 F. 2d 816;*

*Hickman v. U. S., 170 F. 2d 353, 5 C. C. A.;*

*Markham v. U. S., 160 U. S. 319;*

*United States Constitution, Amendment 6.*

The *Hess* case sets out the requisites of a valid indictment and in *Cruikshank* it was stated that an indictment must contain every essential element of the offense and must be charged positively and not by inference.

The indictment in this case totally failed to charge an offense under the statutory language. The use of the word unlawful was indispensable where there were exceptions created under the Statute. The indictment should have alleged that a firearm was transported. The rule is recognized that an indictment is sufficient if it affords the accused an opportunity to know the nature of the charge and to plead the judgment in bar, however, this does not render an indictment sufficient which does not contain the necessary elements of the offense itself.

The following cases have impliedly approved indictments under the Firearms Act which contained all of the elements of the offense:

*U. S. v. Tott, 319 U. S. 463;*

*Rivera v. U. S., 151 F. 2d 47;*

*Monge v. Sanford, 145 F. 2d 227.*

2. Petitioner urges that the Court of Appeals was in error in holding that Petitioner was within the Federal Statute where the proof showed that he had not been finally convicted of burglary in Texas. The holding of the Court in affirming this cause is in conflict with the following decisions:

*Nicholson v. U. S., 141 F. 2d 552, 9 C. C. A.*
holding that the conviction required under Title 15, Sec. 902(e), must be a final one under the State law where the conviction occurred.

The following cases have construed the term conviction to mean a final conviction:

*Crawford v. U. S., 41 F. 2d 979, 980;*

*Thomas v. U. S., 121 F. 2d 905;*

*Singer v. U. S., 278 F. 415, 420.*

The fact that it is also an offense to transport a firearm where a fugitive from justice, or one under indictment would not permit a conviction of one charged to have been finally convicted who had not been so convicted for the reason that a variance would result.

3. The Court of Appeals committed an error of law in holding that the Trial Court properly overruled the Motion to Suppress Evidence. The decision is in conflict with:

*McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608;*

*Upshaw v. U. S., 335 U. S. 410;*

*Changwai v. U. S., 125 F. 2d 915, C. C. A. N. Y. 1942;*

*Gambino v. U. S., 275 U. S. 310.*

The facts in this case call for the application of the rules of law as set out in the above decisions. There was ample proof in Petitioner's sworn affidavit to show that the evidence was illegally obtained. The approval of the use of said illegal evidence by the Court of Appeals rendered the Court's decision in conflict with the above cases.

## IMPORTANCE

It was held in *Nardone v. U. S., 308 U. S. 338,* that the Supreme Court in the exercise of its supervisory authority over the administration of criminal justice in the Federal Courts is not restricted to the requirements of the Constitution with reference to rules of evidence and to procedure. It is conceded that mere errors of law in the conduct of Federal cases are often not sufficient reason for a Writ of Certiorari unless the questions are important. The correct rule of law to be applied under the Federal Firearms Act with reference to indictments and evidence is important to the entire Federal judiciary. A decision of the questions presented in this Petition would be of great value to all the lower Federal Courts. The decision of the Court of Appeals has misconstrued the plain wording and meaning of the Federal Statute, Title 15, Sec. 902(e), which requires a final conviction of a crime of violence. The importance of the questions presented in this Petition should be sufficient grounds for granting a Writ of Certiorari.

## CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

.....

CHARLES W. TESSMER,
202 Fidelity Building,
Dallas, Texas,
*Counsel for Petitioner.*

I hereby certify that on the ..... day of ....., 1955, I mailed two copies of this Petition, postage prepaid, to the Solicitor General of the United States, at his office in Washington, D. C., and a copy, postage prepaid, to Mr. Paul W. Cress, United States Attorney, Oklahoma City, Okla.

.....

CHARLES W. TESSMER

## APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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May Term, 1955

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Number 5064

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JAMES WADE BRASWELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

---

Charles William Tessmer (Ralph Samara was with him on the brief) for Appellant;

H. Dale Cook, Ass't United States Attorney (Paul W. Cress, United States Attorney, and George Camp, Assistant United States Attorney, were with him on the brief), for Appellee.

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Before PHILLIPS, Chief Judge, HUXMAN and PICKETT, United States Circuit Judges.

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HUXMAN, Circuit Judge.

The appellant, James Wade Braswell, was convicted in the trial court of transporting a firearm in interstate commerce after having previously been convicted of a crime of violence, in violation of 15 U. S. C. A. §902(e), and was sentenced to five years in prison. He assigns various errors upon which he relies for reversal on this appeal.

The evidence shows substantially the following facts: On the early morning of Saturday, October 17, 1953, several officers of the Oklahoma City Police Department searched an apartment at 824 East Drive, Oklahoma City, occupied by a girl named Peggy Raleigh, after having first obtained a search warrant based on probable cause for believing that intoxicating liquors and narcotics were to be found therein. In their search, the officers found a .38 caliber super automatic Colt pistol in a chest of drawers. About that time the defendant Braswell entered the apartment and stated that the gun was his, producing a receipt from a Dallas, Texas, Company, to show that the gun was not stolen. At that time he told the officers that when he came from Dallas to Oklahoma City he brought the gun along in his luggage. Both the girl and Braswell were arrested and taken into custody to the city jail. Later that morning a special agent for the F. B. I. interviewed Braswell. At the trial, the F. B. I. agent testified that he asked Braswell if he knew it was a violation of federal law to transport a gun in interstate commerce after having previously been convicted of a crime, that Braswell stated that he had not known this and, if he had, he would not have brought the gun with him. Braswell in his testimony at the

trial admitted telling the officers at the apartment that he brought the gun with him from Dallas, but claimed that this was false because he was only trying to protect the girl. He denied making any such statement to the F. B. I. agent and testified that Peggy Raleigh brought the gun from Dallas.

On the Monday morning following his arrest on Saturday, the defendant was placed in the custody of federal authorities and immediately arraigned before a commissioner on the charge for which he was ultimately convicted.

The evidence at the trial further showed that Braswell previously had been tried and convicted of the crime of burglary in the State of Texas and had successfully applied for a suspended sentence under the Texas statutes allowing a defendant who had not previously been convicted of a felony to receive a suspended sentence. By Texas law such a sentence is a non-final, non-appealable judgment.

Appellant has assigned as error the action of the trial court in overruling his motion to dismiss the indictment. The contention apparently is that the statute, 15 U. S. C. A. §902(e),[1] requires the transportation to be unlawful and the failure of the indictment to so allege is fatal to its validity. The phrase "It shall be unlawful" in the statute is merely a method of proscribing the act of transporting a firearm under the enumerated conditions, and is not

[1]"It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition." 15 U. S. C. A. §902(e).

made an element of the offense itself. It is equivalent to the phrase "It shall be an offense," and following it the offense is described and its elements set forth. Thus, the statute does not require the act of transportation across a state line to be done "unlawfully" but only requires the transportation, which is made an offense in itself if the one transporting it is under indictment, has been convicted of a crime of violence or is a fugitive from justice. Under these conditions, the only intent necessary is the intent to accomplish the act of transportation across a state line, and the statement of the act itself implies such intent. Where the act charged necessarily includes a general intent or is in its very nature unlawful, it need not be alleged that the act was done unlawfully.[2]

Thus, the averment of the indictment that appellant transported in interstate commerce a .38 caliber super automatic from Dallas, Texas, to Oklahoma City, Oklahoma, after having previously been convicted of a crime of violence, in violation of the statute, was clearly sufficient. The further contention of appellant, that the indictment did not allege the transportation of a firearm, is without merit. The indictment did not use the term "firearm," but described the item as "a .38 Caliber Super Automatic, Serial #51247." The sufficiency of a criminal pleading should be determined by practical rather than technical considerations,[3] and in determining the sufficiency of an indictment the court will not consider possibilities beyond

[2]Musey v. United States, 37 F. 2d 673; 42 C. J. S., Indictments and Informations, §§133, 134.

[3]Tatum v. United States, 110 F. 2d 555.

the range of rational experience.[4] Under these well established rules, the description given sufficiently informed the appellant that he was charged with transporting a firearm in violation of the Act.

Appellant also contends that he was not previously convicted of a crime of violence as required by the statute. His argument on this point hinges on the fact that after his conviction for burglary he was given advantage of the Texas rehabilitation statutes which allow the presiding judge to suspend sentence. Under Texas law, when an order is entered suspending sentence, there is no final order from which the defendant can take an appeal.[5] It is contended that since no final appealable sentence on his conviction has been entered, appellant has not been convicted as required by the federal statute. A reading of Section 902(e)[6] shows that those under indictments or fugitives from justice are put in the same class as those convicted. The evident purpose of this statute was to place restrictions on the transportation of firearms by persons whose past records indicated they were of dangerous propensities and likely to use firearms for illegal purposes.[7] It would indeed be a strange construction of the statute which would impose its sanctions on those under indictment and not yet tried but would not include within its prohibition those convicted of crimes of violence and receiving suspended sentences. There is no contention that appellant

[4]Norton v. United States, 92 F. 2d 753.
[5]Fitch v. State (Crim. App. Tex.), 235 S. W. 2d 896.
[6]See Footnote 1.
[7]See Cases v. United States, 131 F. 2d 916, Cert. denied, 309 U. S. 770.

was not convicted, and the Texas Statutes relied on constantly refer to the "conviction" of the defendant who is to have the benefits of the Act.[8] To then say that a conviction within the meaning of the federal statute must be final and appealable is to place in the Act what Congress did not intend. All that is necessary under the Act is conviction of a crime of violence. The appellant was so convicted and hence was within the prohibitive terms of 15 U. S. C. A. §902(e). In this connection it may be noted the trial court properly excluded defendant's exhibits one through six from the evidence before the jury and received them before the court only. These exhibits were the Texas statutes providing for suspension of sentence, and Braswell's application for the benefits thereunder. His defense based on these exhibits was purely one of law which was not within the province of the jury. And, further, since this was a question of law the court did not err in refusing to allow the defendant to testify that he was laboring under a mistake of fact as to whether he had been "convicted" of a crime of violence, for even if he was mistaken as to this, ignorance or mistake of law is no defense.[9]

Immediately prior to the trial, the appellant filed a motion to suppress all the evidence secured as a result of the search of the apartment and that secured during his incarceration prior to his hearing before the Commissioner. In a supporting affidavit he alleged that the Oklahoma City Police Commissioners were acting in cooperation with federal officers, that the search warrant was invalid by

[8]Vernon's Ann. C. C. P. Article 776, et seq.
[9]United States v. Mansavage, 178 F. 2d 812, 817.

the federal rules, that he was threatened by the officers and questioned by them concerning a violation of the Mann Act, a federal statute; and that his incarceration pending the hearing was unreasonable in length. The motion was apparently heard by the court prior to the trial, and no immediate ruling was made thereon.

Rule 41(e) of the Federal Rules of Criminal Procedure provides that the motion to suppress evidence shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but that the court in its discretion may entertain the motion at the trial. While it is clear that appellant should have filed the motion much sooner than he did, apparently the court did in its discretion entertain the motion. But there was no testimony by the defendant or anyone else in the trial indicating that threats were used by the police officers in the apartment to gain the cooperation of appellant, or that the officers there questioned him concerning a Mann Act violation. Neither was there any evidence that the local officers were cooperating with federal officers or agents. The uncontradicted testimony of Officer Cliff W. Roberts, from the Narcotics Division of the Oklahoma City Police Department, who was one of those searching the apartment, was that they were investigating liquor and narcotics violations pursuant to the search warrant, and did not know at that time that it was a federal offense for one convicted of a crime of violence to transport a firearm in interstate commerce. Appellant was held from Saturday morning to Monday morning before he was placed in fed-

eral custody and taken before the Commissioner, and according to his own testimony he had admitted facts establishing a crime. No coercion or intimidation of any sort occurred while he was being held. Under these circumstances, the evidence gained from appellant while he was so held is not inadmissible as gained in violation of the rule enunciated in McNabb v. United States, 318 U. S. 332.[10] In view of the last minute filing of the motion to suppress and supporting affidavit, and the total absence of any evidence tending to support them, we can only conclude that the motion was without substance and properly overruled.

Appellant next contends that there was not sufficient evidence corroborating his admissions to sustain a conviction. In his discussion of this contention in his brief, appellant does not cite the recent Supreme Court cases, Opper v. United States, 348 U. S. 84, and Smith v. United States, 348 U. S. 147, which have clarified the law of corroboration in criminal cases. The rule laid down in the Opper decision is that corroborative evidence is necessary not only for extra-judicial confessions, but also for admissions of essential facts or elements of the crime, subsequent to the crime, and for exculpatory statements. However, the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is only necessary that the Government introduce substantial independent evidence tending to establish the trustworthiness of the admission. It is enough if the independent evidence

[10]See our recent discussion of the McNabb rule under circumstances similar to those found in this case in Pixley v. United States, 220 F. 2d 912.

suppports the essential facts admitted sufficiently to justify a jury inference of their truth. When this test has been met, the evidence as a whole must still, of course, be sufficient to find guilt beyond a reasonable doubt.

Applying these tests to the evidence in this case, we believe that the evidence corroborating the appellant's admissions was more than sufficient. The independent evidence established that appellant purchased the gun in Dallas, that thereafter it was in his possession, that he came to Oklahoma City with his personal belongings around October 1, 1953, and thereafter the gun was in his possession at that place. It was found in a drawer there with other of his belongings in an apartment rented by him. It was also established independently of his admission that appellant had been previously convicted of a crime of violence.

Appellant predicates error on the refusal of the trial court to give certain instructions. However, while we are of the view that the instructions given were adequate in all respects, a review thereof is precluded by the failure of appellant to make proper objection before the jury retired. Rule 30, F. R. C. P.; Jones v. Koma, 218 F. 2d 530. We have examined other assignment of error by the appellant and find them to be without merit.

AFFIRMED.

## APPENDIX B

Title 15, Section 902e U. S. C. A. provides:

"Sec. 902e. It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

Title 15, Section 904 U. S. C. A. provides:

"Sec. 904. Excepted persons. The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm, or ammunition, sold or shipped to, or issued for the use of, (1) the United States or any department, independent establishment, or agency thereof; (2) any State, Territory, or possession, or the District of Columbia, or any department, independent establishment, agency, or any political subdivision thereof; (3) any duly commissioned officer or agent of the United States, a State, Territory, or possession or the District of Columbia, or any political division thereof; (4) or to any bank, public carrier, express, or armored truck company organized and operating in good faith for the transportation of money and valuables; (5) or to any research laboratory designated by the Secretary of the Treasury: Provided, that such bank, public carriers, express, and armored-truck companies are granted exemption by the Secretary of the Treasury; nor to the transportation, shipment, or receipt of any antique or unserviceable firearms, or ammunition, possessed and held as curios or museum pieces: Provided, that nothing contained in this section shall be construed to prevent shipments of firearms and ammunition to institutions, organizations, or persons to whom such firearms and ammunition may be lawfully

delivered by the Secretary of War, nor to prevent the transportation of such firearms and ammunition so delivered by their lawful possessors while they are engaged in military training or in competitions. June 30, 1938, c. 850 Sec. 4, 52 Stat. 1252."

Rule 7 C, F. R. C. P. provides:

"Rule 7(c). Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Article 62, V. A. P. C. Texas provides:

"Art. 62. Subsequent conviction for felony. If it be shown on the trial of a felony less than capitol that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 769, V. A. C. P. Texas provides:

"Art. 769. Sentence when appeal is taken. When an appeal is taken from a death penalty, sentence shall not be pronounced, but shall be suspended until the decision of the Court of Criminal Appeals has been received. In all other cases of felony, sentence shall be pronounced before the appeal is taken. Upon the affirmance of the judgment by the appellate court, the clerk shall at once send its mandate to the clerk of the court from which the appeal was taken, there to be duly recorded."

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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 303

JAMES WADE BRASWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 9–17; 2 R. 3) [1] is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals (2 R. 13) was entered July 1, 1955. A petition for rehearing (2 R. 14–17) was denied on July 16, 1955 (2 R. 18) and the petition for a writ of certiorari was filed on August 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] "R." refers to the Transcript of Record and "2 R." to the proceedings in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether petitioner who was given a suspended sentence for burglary in Texas was convicted of a crime of violence within the meaning of 15 U. S. C. 902 (e).

2. Whether the court properly denied petitioner's motion to suppress evidence taken by state officers pursuant to a state warrant and admissions made at the time of and later in the morning of the arrest.

3. Whether the indictment was defective in that it failed to allege that the transportation was "unlawful" and in that it described the article transported as "a .38 caliber Super Automatic, Serial #51257" and did not contain the statutory word "firearm."

STATUTE AND RULE INVOLVED

15 U. S. C. 902 (e) provides:

> It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

Rule 41 (e), F. R. Crim. P. provides:

> Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the

return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

## STATEMENT

Petitioner was convicted (R. 12–13) by a jury in the United States District Court for the Western District of Oklahoma on an indictment (R. 4) charging violation of 15 U. S. C. 902 (e) by transportation of a pistol in interstate commerce after having been previously convicted of a crime of violence, burglary, in Texas. He was sen-

tenced to five years' imprisonment (R. 16). On appeal his conviction was affirmed (2 R. 3).

The facts relevant to the issues raised by the petition for a writ of certiorari may be summarized as follows:

At about 1:30 a. m. on Saturday, October 17, 1953, a narcotics officer of the Oklahoma City Police Department (R. 20, 21) in company with four other officers (R. 23) and pursuant to a search warrant (R. 9–10) issued upon affidavit (R. 10–12) which alleged the illicit keeping of liquor and narcotics on the premises, searched the apartment of a girl named Peggy Raleigh (R. 20). He found a .38 caliber Colt automatic pistol (R. 21). Petitioner entered during the search (R. 23). When the officer asked Miss Raleigh if the gun belonged to her, she stated that it was petitioner's and he admitted that it was, offering to prove that he had bought and paid for it (R. 24). He produced a receipt from a Dallas store evidencing his purchase of the gun (R. 25–26). Petitioner stated that when he came to Oklahoma City from Dallas he brought the gun along in his luggage (R. 27). He was arrested and taken to the city jail (R. 31).

An F. B. I. agent testified that he interviewed petitioner about 9:00 a. m. that morning (R. 36, 41) after his office had been advised by the city police that they had someone for him to interview (R. 39–40). Petitioner, after having been warned

of his right to give no statement (R. 6–7, 36), told the agent that he had been convicted of burglary in Texas and that he had bought and paid for the gun in Texas (R. 37). He did not deny having transported the gun from Dallas to Oklahoma City (R. 38).

Petitioner asked the agent if he could use the telephone and was told to make a request to the jailer since he was in the custody of the city police (R. 40). On October 19, the Monday following the Saturday interview, the agent filed his charge against petitioner (R. 42).

On the morning of the trial, almost a year after his arrest, petitioner filed a motion to suppress his admissions to the officers, the pistol, and the bill of sale (R. 5–8). He alleged unlawful cooperation between the federal and local agents in their questioning him with respect to federal offenses only, illegal delay in arraignment, and threats of the local officers which, he said, coerced his admission of ownership of the pistol.

The motion was overruled on the second day of the trial (R. 18) and the trial court admitted the evidence.

## ARGUMENT

1. Petitioner contends (Pet. 6–7) that his conviction for burglary did not constitute a conviction within the meaning of the Federal Firearms Act, 15 U. S. C. 902 (e), because a suspended

sentence is not a final judgment under Texas law.[2] The effect given by Texas to convictions made subject to the suspended sentence law, is not, however, determinative of the meaning of the word "conviction" as used by Congress in the Federal Firearms Act; rather, the meaning is to be determined by reference to federal law. See *United States* v. *City of New Britain,* 347 U. S. 81; *Howard* v. *Commissioners,* 344 U. S. 624; *United States* v. *Security Trust and Savings Bank, Executor,* 340 U. S. 47, 49. Cf. *Pino* v. *Landon,* 349 U. S. 401.

Even under Texas law, while a conviction in which the sentence is suspended is not such a final conviction as will support an enhancement of punishment as a multiple offender, unless the suspen-

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[2] The Texas statute provides that in cases of first offenders sentence not exceeding 5 years, for certain crimes, may be suspended either by the court or on jury recommendation, during the convict's good behavior; that the only way in which a suspended sentence may become final is by conviction of another felony or certain misdemeanors during suspension of the sentence, which results in making final the first conviction and cumulating the penalties on both, with no right of appeal on the first conviction; that after expiration of the time assessed as punishment, the defendant may, by motion showing that he has not been convicted of a felony since such former conviction, obtain a court order reciting such fact after which the court shall grant a new trial and dismiss the action; that after the setting aside and dismissal of such "judgment of conviction * * * the fact of such conviction shall not be shown * * * for any purpose except in cases where the defendant has been again indicted for a felony and invokes the benefit of this law." Vernon's Texas Code of Crim. Procedure, Arts. 776 to 781.

sion has been revoked, *Fetters* v. *State,* 108 Tex. Cr. R. 282, 1 S. W. 2d 312, a judgment granting an accused the benefit of the suspended sentence law is a judgment which will support a plea of former conviction. *Coon* v. *State,* 97 Tex. Cr. R. 645, 263 S. W. 914. By virtue of such a conviction, moreover, an accused is not entitled to the benefit of the suspended sentence law on a subsequent conviction. *Bradshaw* v. *State,* 128 Tex. Cr. R. 345, 81 S. W. 2d 83. The Texas Suspended Sentence Statute speaks always of the *conviction* of the defendant. Vernon's Texas Code of Crim. Procedure, Arts. 776–781.

Still more cogent in the instant interpretation is the plain language of the Firearms Act which illuminates the legislative purpose:

> It shall be unlawful for any person *who is under indictment* or who has been convicted of a crime of violence *or who is a fugitive from justice* to * * * transport * * * any firearm * * *. [Italics added.]

As the District Court said in its opinion (R. 50):

> A reading of this section in its entirety shows that Congress was not by any means restricting the transportation of firearms in interstate commerce to only those persons who were the subject of a final, appealable conviction. A person under indictment, or a fugitive from justice, both of whom might or might not be entirely

innocent of the crime with which he was charged, was placed in this restricted class because of the questionable character of his activities, although not yet proved guilty. To then interpret the word "conviction" in the statute to be restricted solely to a final judgment, would be to place one convicted of a crime of violence in a position more preferred than one merely under indictment, for the sole reason that state substantive law provides and encourages rehabilitation of the convicted where possible.

It cannot be seriously urged that one under indictment who transported a firearm in interstate commerce would not be guilty of a violation of this sub-section even though later the persons were found innocent in the state court proceeding. Congress could not have meant to place one in fact convicted and found guilty of a crime of violence in a more favored position than a person later found innocent of the crime with which he was charged but who during the time of indictment transported a firearm.

It is entirely reasonable that Congress should have prohibited the carrying of firearms by all persons convicted of crimes of violence, including those who receive suspended sentences under the Texas statute referred to above. And obviously it could hardly be suggested that such persons would suffer any real hardship on being pro-

hibited from carrying firearms in interstate commerce. Cf. *Pino* v. *Landon,* 349 U. S. 901.

2. The trial court properly overruled petitioner's motion to suppress evidence.

a. The gun and pistol were taken by state officers who conducted a search under a state warrant alleging violations of state law by the possession of liquor and narcotics (R. 9–11), the legality of which has not been challenged. The evidence was thus seized by state officers operating entirely on their own account pursuant to a state warrant and in the absence of any purpose of aiding in the enforcement of federal law (see R. 33), and was properly held available to the federal government in this prosecution. Cf. *Byars* v. *United States,* 273 U. S. 28, 33; *Gambino* v. *United States,* 275 U. S. 310.

b. Petitioner's admissions to the state officers at the time of his arrest manifestly do not fall within the rule of *McNabb* v. *United States,* 318 U. S. 332. The statements to the F. B. I. agent were not made during a period of illegal detention. Petitioner was interviewed by the federal agent about 9:00 a. m. on the day he was arrested by state officers. When state officers discover a person committing a federal crime, some time must necessarily elapse during which federal officers can be notified and make their own investigation as to whether a federal offense has been committed. The time here involved was clearly not unreasonable. It does not appear whether it

would have been possible to arraign petitioner on Saturday, but, in any event petitioner's oral admission preceded the detention and cannot be deemed its fruit. As this Court said in *United States* v. *Mitchell*, 322 U. S. 65, 70: "the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures."

c. Petitioner apparently contends that he was denied a separate hearing on his motion to suppress, since he claims that the decision below is in conflict with *Cheng Wai* v. *United States*, 125 F. 2d 915 (C. A. 2).[3]

Petitioner filed his motion on the morning of the trial, approximately one year after his arrest.[4] Rule 41 (e), F. R. Crim. P., provides "The motion [to suppress evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion

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[3] In that case the Court of Appeals found no merit in Cheng Wai's contention that he was entitled to a hearing on his motion to suppress, in order to afford him an opportunity to cross-examine narcotics agents, since Cheng Wai alleged nothing in his motion specifically contradictory of the agent's account of the search. Petitioner apparently feels that his specific allegations entitled him by implication to a separate hearing on the motion.

[4] Though the *Cheng Wei* decision obviously has little significance with respect to petitioner's situation, it is noteworthy that Cheng Wai filed his motion before indictment.

at the trial or hearing." The rule is in accord with this Court's admonition as to the necessity for timeliness in making claims contesting the legitimacy of evidence in the Government's possession. *Nardone* v. *United States,* 308 U. S. 338, 341, 342. Apparently petitioner's motion was heard by the court before the jury was impaneled (see R. 19, 20, 24, 25, 26). But in any event petitioner was afforded ample opportunity, which he exploited, to cross-examine prosecution witnesses with respect to his claims of illegal detention and improper cooperation between State and Federal officers (R. 27–35, 38–44). Thus it is clear the he had ample opportunity to develop any relevant facts.

3. (a) There is no merit in petitioner's contention that the indictment was fatally defective in that it referred to a ".38 caliber Super Automatic, Serial #51257," rather than using the statutory term "firearm." The former was obviously a description of the particular firearm alleged to have been transported. The indictment was sufficiently certain since it charged the offense substantially in the language of the statute, *Pounds* v. *United States,* 171 U. S. 35, and it met the test of apprising petitioner of the charge he had to meet, and enabling him, after judgment, to plead the judgment in bar of further prosecution for the same offense. *United States* v. *Debrow,* 346 U. S. 374.

(b) Petitioner's further suggestion (Pet. 5) that the indictment was defective in that it failed to charge an "unlawful" transportation is frivolous. As the Court of Appeals said: "'It shall be unlawful' in the statute is merely a method of proscribing the act of transporting a firearm under the enumerated conditions, and is not made an element of the offense itself. It is equivalent to the phrase 'It shall be an offense,' and following it the offense is described and its elements set forth."

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
*Solicitor General.*
WARREN OLNEY III,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
*Attorneys.*

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